

NTSB Order No. EA-4938

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 22nd day of January, 2002

Docket SE-15961

Respondent appeals the oral initial decision of Administrative Law Judge William A. Pope, II, issued on December 6, 2000, after a hearing held in Miami, Florida.¹ By that decision, the law judge affirmed the Administrator's Order of Suspension of "any and all Commercial Pilot certificates" after finding that respondent violated section 91.13(a) of the Federal

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Aviation Regulations ("FARs"), but not, as also alleged by the Administrator, FAR sections 91.175(c)(1), 91.175(e)(1)(i) and 91.175(e)(1)(ii).² The law judge upheld sanction, but modified the 30-day suspension sought by the Administrator to a 5-day suspension of respondent's commercial certificates.³ We grant respondent's appeal.

Respondent was the second-in-command, or first officer, of Florida West International Airways Flight 228, a "heavy" Douglas DC-8-71 freighter that suffered damage to the left wing and outboard engine nacelle during an aborted landing attempt and ground strike at Greensboro, North Carolina. The incident occurred subsequent to a VOR approach to runway 5 during which respondent was the pilot flying, but the events cited in the Administrator's complaint occurred during a 23 to 27-second period while the captain was manipulating the flight controls. As the aircraft was level at the minimum descent altitude of

² FAR section 91.13, 14 C.F.R. Part 91, states in part:

Sec. 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

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³ FAR section 91.175 pertains to instrument approaches, and, specifically, in relevant part, the circumstances under which an aircraft can be flown below minimum approach altitudes and the circumstances that mandate executing an immediate missed approach. The Administrator does not appeal the dismissal of the FAR section 91.175 charges, or the sanction reduction.

approximately 400 feet above ground level, and approaching the missed approach point, the captain called that he had the runway in sight and took control of the aircraft. At that moment, the aircraft was left of the runway centerline, and near the airport boundary. Immediately after taking control of the aircraft, the captain executed a diving, 25-degree bank S-turn -- turning right and then immediately left -- in an attempt to line up with the runway.⁴ The captain ultimately executed a go-around, but not until after the ground strike and after the aircraft crossed the runway centerline from left to right at, according to FAA Aviation Safety Inspector Lee Imbrie, an "oblique" angle.⁵ Inspector Imbrie was seated in the cockpit jumpseat aboard Flight 228 and initiated the FAA investigation of Flight 228's captain and first officer.⁶ Simply stated, the Administrator's complaint about respondent is that he did not, as the pilot-not-flying,

⁴ The VOR approach to runway 5 at Greensboro has an inbound course of 30 degrees, the runway is aligned at approximately 53 degrees, and the missed approach point -- measured by distance from the VOR -- is at the runway threshold.

⁵ It appears that the aircraft crossed the runway, from left to right, while still in a bank to the left, at an intercept angle offset by at least 10 degrees from the runway centerline, and, according to Inspector Imbrie, only the left side of the aircraft was over the runway surface when the aircraft made contact with the ground. Inspector Imbrie stated that, at the time, he thought that the impact was the left main gear bogie contacting the right edge of the runway. (Inspector Imbrie also stated that he was surprised by the sudden actions of the captain and did not intervene for fear of causing an accident.)

⁶ The Administrator also brought charges against the captain -- with nearly the same complaint that was filed in respondent's case -- but, from this record, it appears that those charges were settled without a hearing.

adequately perform his crew duties, and, specifically, did not call for a go-around.

The law judge found that respondent did not call for a go-around during the captain's maneuvering, after concluding that the contrary testimony by each of the crew members of Flight 228 was not credible. The law judge also found that although respondent was not the flying pilot during the incident, he was operating the aircraft within the meaning of the FARs:

I do not doubt that [respondent] was frightened as Inspector Imbrie was, but twenty-seven seconds was enough time for him, as the second-in-command with a responsibility for the safe flight of the aircraft, to assess the situation and react. He should have asked the captain to go around ... as he shared responsibility for [the] safe operation of the aircraft with the [captain]. I find that his failure to take any action at all, under these circumstances, when he had a duty to act, at least to the extent just described, amounted to careless operation of the aircraft ... in violation of section 91.13(a).

The law judge also concluded, however, that "[a]lthough the captain's actions clearly could be said to have violated [FAR sections 91.175(c)(1), 91.175(e)(1)(i), and 91.175(e)(1)(ii)], ... respondent did not participate in what the captain did, did not give his concurrence, and lacked the time and any reasonable way of physically stopping the [captain] from the reckless manner in which he suddenly operated the aircraft." Accordingly, the law judge modified the sanction sought to a 5-day suspension.⁷

⁷ The Administrator's counsel informed the law judge that despite seeking a 180-day suspension against the captain in the Administrator's complaint against him, the Administrator's
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On appeal, respondent argues that the complaint did not provide him with adequate notice that the basis for the Administrator's charges was his failure to countermand the captain's decision to continue the approach by calling for a go-around, and, in the alternative, that the evidence does not support the law judge's finding that respondent did not call for a go-around in violation of FAR section 91.13(a). The Administrator urges us to uphold the law judge's findings and conclusions.

As a threshold issue, we must address whether, as respondent claims, respondent was denied adequate notice of the charges against him and, therefore, a sufficient opportunity to defend against them. We think that he was, and that this is evident by comparing the law judge's reasoning with the language of the complaint. The complaint is virtually identical to the complaint that was issued against the captain, and, generally, describes the maneuvers which took place after the captain took the flight controls from respondent. More importantly, however, the complaint does not mention the theory under which the law judge

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settlement agreement with the captain permitted him to escape sanction on account of a report he filed pursuant to the Aviation Safety Reporting System ("ASRS"). Respondent, apparently, did not file an ASRS report. Accordingly, the law judge found it "appropriate to reduce the penalty against [respondent] below what might otherwise be an appropriate sanction under the Administrator's sanction guidance table in order to achieve some measure of comparability in sentencing."

held respondent partially accountable for those maneuvers -- that he failed to call for a go-around. Respondent is entitled to notice of the basis of the Administrator's charges, and, in this regard, he claims that had he understood that the Administrator objected to an alleged failure to voice objection during the brief and sudden maneuvering by the captain, he would have prepared his defense differently and called at least one additional, percipient witness. We think it was prejudicial error for the law judge to uphold the section 91.13(a) violation on grounds not adequately described in the complaint.

Administrator v. Bell, 5 NTSB 289 (1985).⁸

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;
2. The law judge's initial decision upholding the Administrator's Order of Suspension is reversed; and
3. The Administrator's Order of Suspension is dismissed.

BLAKEY, Chairman, CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁸ We recognize that the events at issue transpired very quickly, and that at the onset of the captain's maneuvers respondent was transitioning from his focus on the flight instruments, but, on this incomplete record, at least, it would appear that there was sufficient time for respondent to recognize an unsafe situation and attempt to do something to correct it. Whether he fulfilled that duty is not clear, or knowable, on this record, however, for respondent was not provided reasonable opportunity to present his case on that issue.